THE URBAN LAW FIRM
MICHAEL A. URBAN, Nevada State Bar No. 3875
NATHAN R. RING, Nevada State Bar No. 12078
4270 S. Decatur Blvd., Suite A-9
Las Vegas, NV 89103
Telephone: (702) 968-8087
Facsimile: (702) 968-8088
Electronic Mail: murban@theurbanlawfirm.com
nring@theurbanlawfirm.com
Counsel for International Brotherhood of Electrical Workers, Local Union 357

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 357, AFL-CIO and DESERT SUN ENTERPRISES LIMITED d/b/a CONVENTION TECHNICAL SERVICES,	CASE NO: 28-CC-115255 **RESPONDENT'S RESPONSE TO BRIEF OF AMICI, ASSOCIATED GENERAL CONTRACTORS, ASSOCIATED BUILDERS & CONTRACTORS, AND COUNCIL ON LABOR LAW EQUALITY**

The charged party and respondent herein, International Brotherhood of Electrical Workers, Local Union 357, AFL-CIO ("Local 357"), by and through its counsel of record, the Urban Law Firm, hereby files its Response to Brief of Amici, Associated General Contractors, Associated Builders & Contractors, and Center for Labor Law Equality.

By way of letter, the National Labor Relations Board granted AFL-CIO Building and Construction Trades Department, the Associated General Contractors, and the Council on Labor Law Equality's motions requesting leave to file amicus briefs in this case. Following the Board's Order allowing the amicus briefs, the Associated Builders and Contractors ("ABC") filed a

motion requesting the ability to file an amicus brief and submitted a proposed amicus brief in this case. The Board has not yet granted this motion. To ensure it responds to the arguments made by ABC, Local 357 will respond to those arguments in this responsive brief.

ARGUMENT

Board precedent requiring a labor union to provide assurances that its picketing at a common situs will comply with *Moore Dry Dock* standards—also called *Moore Dry Dock* assurances—should be set aside in favor of the position stated by the United States Courts of Appeal for the Ninth and D.C. Circuits. The Board's current position, which requires a union to essentially place a disclaimer in all communications pertaining to picketing at a common situs, ignores the non-formalistic realities of labor relations and adds an unnecessary condition that requires a labor union, when acting lawfully, to state it is so doing. Providing *Moore Dry Dock* assurances serves no purpose and in no way prevents unlawful actions from taking place or upholds the purpose of the Act. The Board's current position only requires a prophylactic statement that serves no purpose other than to create a per se violation of the *Moore Dry Dock* standards and the Act. The decisions by the Ninth and D.C. Circuits succinctly provide convincing arguments why current Board precedent should be overturned.

Arguments by Amici otherwise ignore this important reasoning and also fail to recognize that providing assurances of compliance with *Moore Dry Dock* standards lack any meaningful purpose. ABC's arguments that the charging party should have been allowed to present its own evidence ignores the General Counsel's prosecutorial discretion and the charging party's own failure to timely make its exceptions in this case.[1] Finally, Amici's arguments pertaining to application of Board precedent concerning employee handbooks does not support their position, but in reality, supports the positions of the General Counsel and Respondent in this case.

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[1] ABC's preposterous claim that there was collusion between the General Counsel and Local 357 brings into question the credibility of all of its arguments. ABC's decision to engage in *ad hominem* attacks against the General Counsel and Local 357 is quite unfortunate. (*See* ABC's Amicus Brief at 3, 8).

I. THE BOARD SHOULD ADOPT THE REASONING OF THE NINTH AND D.C. CIRCUITS AND CEASE REQUIRING LABOR UNIONS TO PROVIDE UNNECESSARY ASSURANCES THAT THEIR LAWFUL PICKETS WILL COMPLY WITH *MOORE DRY DOCK.*

The Board's current case law, which requires a union to state its picketing will be conducted lawfully for its picketing to actually be deemed lawful, has been denied enforcement by two U.S. Circuit Courts of Appeal. *Sheet Metal Workers, Local 15 v. NLRB*, 491 F.3d 429, 435-36 (D.C. Cir. 2007); *Plumbers & Pipefitters, Local 32 v. NLRB*, 912 F.2d 1108, 1111 (9th Cir. 1990) In fact, the Ninth Circuit has issued two published decisions refusing to enforce the Board's precedent on this issue. *Plumbers & Pipefitters Local 32*, 912 F.2d at 1111; *NLRB v. Ironworkers Local 433*, 850 F.2d 551, 557-58 (9th Cir. 1988). These cases held it is not a violation of Section 8(b)(4) for a union to communicate its intent to picket a primary employer at a common situs to a secondary employer without also providing a disclaimer that such picketing will be in compliance with *Moore Dry Dock. Plumbers & Pipefitters Local 32*, 912 F.2d at 1111; *Ironworkers Local 433*, 850 F.2d at 557-58.

The Board's current precedent on this topic misses the mark because the "per se presumption is without foundation in the NLRA and…it is contrary to general legal principles." *Ironworkers, Local 433*, 850 F.2d at 557-58. The Board's standard is also incompatible with the informal nature of labor relations. *Id.* at 556. "Dealings between unions and management should not be held to the rigid formalistic rules that are appropriate to other areas of law." *Id.* at 556-57. When a union is able to picket in a lawful manner, the Board should not presume that such picketing will be unlawful simply because the union does not specifically state its picketing will comply with the *Moore Dry Dock* standards. *Plumbers & Pipefitters, Local 32*, 912. F.2d at 1110. The reasoning of the Ninth Circuit in *Ironworkers, Local 433* and *Plumbers and Pipefitters, Local 32* was cited by the D.C. Circuit and applied by that court in *Sheet Metal Workers, Local 15*. 491 F.3d at 435-36.

In addition to the reasoning stated in the Ninth and D.C. Circuit decisions, important policy interests support overturning current Board precedent on this topic. When Circuit Courts

of Appeal refuse to enforce the law applied by the Board, the opposing bodies of law cause all parties involved—the charging party, respondent, and General Counsel—to expend substantial additional resources in litigation of a case. In this case, if the Board upholds the ALJ decision, Local 357's appeal will go before the Ninth Circuit or D.C. Circuits. This means the process through the Board then to the ALJ will be but a formality in reaching either Circuit Court only to have that court refuse to enforce the Board's precedent. The only thing that can be stated with positivity in these circumstances is this process will increase costs for all involved. Amici ignore this important policy concern.

Current Board law views common situs picketing as per se unlawful merely because a labor union provided notice of such picketing without stating the lawful picketing will be conducted lawfully. Nowhere else in Board law or elsewhere in the law can it be said that a lawful action is unlawful unless the actor does not first state their action is done lawfully. This confusing situation is exactly what current Board precedent creates, and for that reason the ALJ's decision should be denied enforcement and the ALJ's Remedy and Order should not be enforced.

II. AMICI'S ARGUMENTS REGARDING THE CONDUCT OF THE HEARING IGNORE THE CHARGING PARTY'S FAILURE TO TIMELY FILE EXCEPTIONS AND THE GENERAL COUNSEL'S PROSECUTORIAL DISCRETION.

When Congress split the Board' prosecutorial and adjudicatory powers into a separate Board and General Counsel, it granted great discretion to the Board's General Counsel. This power has been recognized for decades. The ability of the General Counsel to prosecute cases as it sees fit is accepted as being unreviewable. In addition to the discretion being broad, a party must timely raise an exception if it wishes to preserve an issue in practice before the Board.

A. THE GENERAL COUNSEL HAS BROAD PROSECUTORIAL DISCRETION AND HE DID NOT EXCEED HIS DISCRETION IN THIS CASE.

The General Counsel of the Board...shall have *final authority...in respect of the...issuance of complaints...and in respect of the prosecution of such complaints before the Board.* 29 U.S.C. § 153(d) (emphasis added).

Congress intended to and did create a prosecutorial system of litigation when it divided the General Counsel and the Board. *Int'l B'hd. of Boilermakers, Union Local 6 v. NLRB*, 872 F.2d 331, 334 (9th Cir. 1989). The General Counsel is given the ability to choose how to present its case—if it chooses to present a case at all. *Id.* Importantly, the charging party is not entitled to stand in place of the General Counsel and act as prosecutor in any case. *Id.* The charging party is also not permitted to "go...beyond the reach of the complaint as issued and prosecuted by the General Counsel...on the grounds that only the General Counsel may adopt...arguments in a complaint under the Act." *California Saw & Knife Works*, 320 N.L.R.B. 224, 276 (1995).

Legislative history relating to the splitting of the adjudicatory and prosecutorial functions of the Board into the Board and a separate General Counsel demonstrate the General Counsel was to have "'vast and unreviewable' power." *Int'l Ass'n of Machinists v. Lubbers*, 681 F.2d 598, 603 (9th Cir. 1982). The General Counsel's role was to be akin to that of "the Attorney General...or a State Attorney General." *Id.*

Like the charging party in *California Saw and Knife Works*, the charging party here attempted to add additional arguments and additional theories of the case that go beyond the complaint issued by the General Counsel. The General Counsel's complaint alleged Local 357 violated the Act by not giving assurances that any picketing it engaged in would be in compliance with *Moore Dry Dock*. There was no dispute from Local 357 that the General Counsel could prove the facts alleged in its complaint and Local 357 and the General Counsel agreed to stipulate to these facts, which is how the General Counsel chose to prosecute this case. Despite Local 357's stipulation to facts contained in the General Counsel's complaint, the charging party demanded to introduce additional facts and evidence to prove new theories of the case that were beyond the theories of the case presented by the General Counsel.

An appropriate analogy regarding the facts of this case is a state prosecutor who obtains a guilty plea from a criminal defendant but then has the victim of the crime demand to present his own evidence. In such a situation, the court would not allow the evidence to be presented or

allow a trial to go forward on such evidence because there is nothing to try. The state prosecutor would have achieved the conviction on her theory of the case.

The facts of this case are directly analogous with such a circumstance. The General Counsel received a stipulation from Local 357 to all the facts within the General Counsel's complaint, which meant there was no need to present additional evidence or try the case. The charging party wanted to present its own evidence when that evidence would be completely unnecessary. Just as a judge would not allow a victim in a criminal case to present his or her own evidence when a criminal defendant pleads guilty to charges, the ALJ here accepted the stipulated facts to prove the General Counsel's Complaint, which would be akin to a guilty plea and refused to allow the charging party to present additional unnecessary evidence.

It is strictly within the General Counsel's statutory grant of power to determine how he chooses to prosecute this case and prove his complaint. In this case, the General Counsel chose to enter into a stipulation of facts with the charged party, which found all necessary facts to prove the General Counsel's complaint.

ABC's contention in its amicus brief that the charging party should have been permitted to present additional evidence ignores the prosecutorial discretion granted to the General Counsel. The General Counsel did not abuse his prosecutorial discretion and the charging party is not entitled to prosecute the case as it prefers. Even if the charging party had properly preserved these issues, which it has not, there is no merit to such a position.

B. THE CHARGING PARTY FAILED TO TIMELY RAISE EXCEPTIONS TO THE CONDUCT OF THE ALJ HEARING.

ABC's Amicus Brief makes the bold and completely incorrect statement that the Charging Party timely filed exceptions to the conduct of the ALJ hearing in this case. (ABC Amicus Brief at 4.) This assertion is incorrect because the charging party untimely filed its exceptions in this case.

Exceptions to an ALJ's decision must be filed within 28 days of the order transferring the case to the Board. NLRB Rules & Regs. § 102.46(a). A party's exceptions may be accompanied

by a brief in support and the brief may not contain any matter not within the scope of the exceptions. *Id.* at § 102.46(c). Furthermore, each exception:

> (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception.

Id. at § 102.46(b)(1). If a party fails to raise an exception, they have waived that exception. *Id.* at § 102.46(b)(2). In addition, any exception that fails to comply with requirements also is deemed waived. *Id.*

In this case, exceptions were due on or before August 25, 2014. On that date, the charging party filed a brief in support of exceptions but it did not file exceptions that day. On August 26, 2014, the charging party filed its exceptions. The charging party's brief failed to meet the requirements for exceptions because it did not set forth specifically the questions of procedure, fact, law or policy to which it took exception. The charging party also failed to concisely state the grounds for its exceptions for the brief to meet the standard for an exception document. Their brief cannot be considered their exceptions because the brief clearly states it is filed in support of exceptions, which must be a separate document and the exceptions cannot contain argument or citation to authority. *Id.* at §102.46(b)(1).

Convention Technical Services' ("CTS") Exceptions were untimely, which means any exceptions they had to the ALJ's decision have been waived. As an amicus, ABC cannot save the charging party's failure to follow the Board's rules pertaining to exceptions in this case. CTS' exceptions have been waived. Therefore, the only exceptions to the ALJ's decision that are properly before the Board are those of the General Counsel and the respondent.

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III. AMICI'S ARGUMENTS PERTAINING TO EMPLOYEE HANDBOOKS ARE UNAVAILING BECAUSE THE BOARD DOES NOT REQUIRE EMPLOYEE HANDBOOKS TO HAVE A DISCLAIMER OF LAWFULNESS.

Amici argued the issue in this case is similar to the Board's treatment of employee handbook provisions, but Amici fail to acknowledge the Board does not require employers to place blanket disclaimers in their handbooks stating all provisions in the handbook are written in compliance with the NLRA or Section 7 of the NLRA. This fundamental difference between the Board's precedent pertaining to union actions, in the context of *Moore Dry Dock*, and employer actions, in the context of employee handbooks, illustrates the need to overturn the Board's current precedent that requires *Moore Dry Dock* assurances be made or the union per se violates the Act.

While it is true employee handbook provisions can lead to liability for employers even without an unlawful intent behind the promulgated rule, *Lafayette Park Hotel*, 326 N.L.R.B. 824, 828 (1998), it is equally true that statements in an employee handbook will not be a per se violation of the Act simply because they could conceivably be read to restrict Section 7 activity. *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646, 646-47 (2004); *see also Palms Hotel & Casino*, 344 N.L.R.B. 351, 355-56 (2005) (stating the Board will not engage in speculation to find a work rule violates employees' Section 7 rights). The Board will look to additional circumstances to determine whether an employee handbook provision reasonably chills employees in exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 N.L.R.B. at 826; *Tradesman Int'l*, 338 N.L.R.B. 460, 461 (2002).

The Board's precedent pertaining to a union's notice of lawful picketing at a common situs is treated very differently from the Board's precedent pertaining to employee handbooks. Whereas an employee handbook provision will not be found to violate the Act simply because it could speculatively chill Section 7 rights, a union commits a per se violation of the Act when it does not provide a clear and unmistakable assurance that its picketing will comply with *Moore Dry Dock* standards. *See Electrical Workers Local 98*, 342 N.L.R.B. 740, 749 (2004). The Board does not hold employers commit per se violations of the Act merely because their employee

handbooks do not contain written assurances that nothing in the employee handbook violates the Act or chills employees' exercise of section 7 rights.[2]

Amici's arguments pertaining to Board precedent on employee handbooks does not bolter their argument regarding the necessity of *Moore Dry Dock* assurances. The Board's precedent pertaining to employee handbooks actually favors overturning Board precedent requiring a union to give specific assurances that its lawful picketing will be completed lawfully. The Board's current precedent, which finds a per se violation of the Act if assurances of compliance with *Moore Dry Dock* standards are not given, does not have support in the Act or in other areas of Board precedent or procedure.

CONCLUSION

Local 357 requests the Board deny enforcement of the ALJ's Conclusions of Law, Remedy and Order. Local 357 requests the Board overturn its current precedent, which requires a union to provide specific, affirmative assurances that it will comply with *Moore Dry Dock*. Local 357 requests the Board to adopt the reasoning of the Ninth Circuit and D.C. Circuit. AGC, ABC, and COLLE's arguments in their amicus briefs do not support maintaining Board precedent requiring a union to provide assurances that its picketing will comply with *Moore Dry Dock*. For these reasons, Local 357 requests the Administrative Law Judge's decision be denied enforcement.

Dated: December 10, 2014.

THE URBAN LAW FIRM

MICHAEL A. URBAN, Nevada State Bar No. 3875
NATHAN R. RING, Nevada State Bar No. 12078
Counsel for Respondent, Local 357

[2] In fact, the contrary may be true: a written savings clause from an employer may be a violation of the Act in and of itself. Report of the Acting General Counsel Concerning Social Media Cases, Memorandum OM 12-59 at 9, 12, and 14 (May 30, 2012).

CERTIFICATE OF SERVICE

I CERTIFY THAT on the 10 day of December, 2014, I served a true and correct copy of the above and foregoing, **RESPONDENT'S RESPONSE TO BRIEF OF AMICI, ASSOCIATED GENERAL CONTRACTORS, ASSOCIATED BUILDERS & CONTRACTORS, AND COUNCIL ON LABOR LAW EQUALITY**, via electronic filing upon the Board through the NLRB's Electronic Filing System. A copy will also be sent first class mail or e-mail, if an e-mail address is indicated, to the following:

Nathan A. Higley, Esq.
Counsel for the General Counsel, Region 28
600 Las Vegas Blvd S, Ste 400
Las Vegas, NV 89101
nathan.higley@nlrb.gov

Gregory Smith, Esq.
Amy Baker, Esq.
Lionel, Sawyer & Collins
1700 Bank of America Plaza
300 South Fourth Street
Las Vegas, NV 89101
gsmith@lionelsawyer.com
abaker@lionelsawyer.com
Counsel for Desert Sun Enterprises d/b/a Convention Technical Services

Richard M. Resnick, Esq.
Sue D. Gunter, Esq.
Sherman Dunn Cohen, et al.
900 7th St., NW, Ste 1000
Washington, DC 20001
gunter@shermananddunn.com

Mark M. Stubley, Esq.
John T. Merrell, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart
300 N. Main Street, Fl. 5
Greenville, SC 29601
mark.stubley@ogletreedeakins.com
john.merrell@ogletreedeakins.com

Harold P. Coxson, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart
1909 K Street, NW, Ste 1000
Washington, DC 20006
harold.coxson@ogletreedeakins.com

Fern Exhibit Group
645 Linn Street
Cincinnati, OH 45203

Las Vegas Convention and Visitors Authority
3150 Paradise Road
Las Vegas, NV 89109

ABC Kids Expo
12302 Hart Ranch
San Antonio, TX 78249

Sean W. Mallon

An employee of **THE URBAN LAW FIRM**